88-687

Supreme Court, U.S.
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

—against—

JOHN REES,
SHEILA LOUISE REES,
and THE INFORMATION DIGEST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

If a United States Magistrate who has reviewed the entire case and before whom all of the crucial depositions were taken concludes, that the plaintiff has presented clear and convincing evidence establishing actual malice by the defendants, may the District Court properly determine upon reviewing the same evidence that no reasonable juror could reach the same conclusion?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a not-for-profit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation and Cordite Fidelity, Inc., a Delaware corporation.

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No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LIBERTY LOBBY, INC.

Petitioner,

v.

JOHN REES, SHEILA LOUISE REES
and THE INFORMATION DIGEST

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Petitioner Liberty Lobby, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 29, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals was decided on July 29, 1988, No. 86-7091. The opinion of the district court is reported at 667 F.Supp. 1 (D.D.C. 1986).

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1988. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1) (1987).

STATUTORY PROVISION

Fed. R. Civ. P. Rule 56(c):

Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is no genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On March 30, 1984 *The Information Digest*, published by John Rees and Sheila Louise Rees, published an article entitled "The LaRouche Apparatus [sic] in the U.S." The article asserted that Lyndon LaRouche espoused Marxist, communist, extremist, paranoid, anti-Semitic, revolutionary views and favored violence, torture and the overthrow of the present constitutional government of the United States. The article also asserted that the plaintiff, Liberty Lobby, Inc., hereinafter Liberty Lobby, was closely linked with

LaRouche, his organizations and that some of the most unsavory alleged activities engaged in by the LaRouche group were initiated as a result of an arrangement with Liberty Lobby. In addition, the article asserted that the LaRouche organization was given the run of the offices maintained by *The Spotlight*, a weekly newspaper published by Liberty Lobby. The article contained numerous specific allegations as to fact about the relationship between Liberty Lobby and the LaRouche organizations. All of the allegations as to fact and the conclusion that there was a close working relationship between Liberty Lobby and the LaRouche organizations and that the worst excesses engaged in by the LaRouche organizations were the result of efforts initiated by Liberty Lobby were false, defamatory and without any foundation in fact.

The Information Digest held itself out to be a publication which conducted in depth investigations, maintained close and valuable contacts with the intelligence agencies of the United States, and published verifiable and factual allegations.

On November 14, 1984, Liberty Lobby filed a complaint for libel against John Rees and *The Information Digest*.

On April 19, 1985 John Rees and David J. Branson, Esquire, counsel for Rees and *The Information Digest*, submitted Answers to Plaintiff's Interrogatories. Interrogatory No. 3 Asked "How are editorial decisions made at *The Information Digest*? Who participates in discussions; who has ultimate editorial responsibility?" The response signed by Rees and Branson was as follows: "*Answer*: Editorial decisions are made by John Rees."

However, on August 30, 1985 Rees, represented by Branson, was asked "Does Mrs. Rees on occasion make editorial decisions?" Rees replied "Yes, she does." (Appendix D, A-33, John Rees Depo., August 30, 1985) During that deposition Rees also asserted that his wife, Sheila Louise Rees, was a signatory to the bank account utilized by *The Information Digest*. (Appendix D, A -30, *Id.*)

On November 18, 1985 plaintiff moved to amend the complaint to add Sheila Louise Rees as a defendant. On March 8, 1985, after the complaint for libel had been filed, *The Information Digest* published a series of allegations regarding Liberty Lobby and its treasurer, Willis A. Carto. The article restated, in essence, the original false assertions made about Liberty Lobby in the previous article and asserted that a long-term relationship between Liberty Lobby and the LaRouche organizations existed and continues.

On January 13, 1986 the plaintiff moved for leave to amend and supplement the complaint regarding *The Information Digest* issue

of March 8, 1985. On March 25, 1986, the Court granted that motion.

In the course of an oral deposition taken before Honorable Arthur L. Burnett, Sr., United States Magistrate, on May 23, 1986, Rees testified that a defamatory statement regarding the relationship between the plaintiff and the LaRouche organization was in part based on information received from a confidential source. The plaintiff sought disclosure of the source. On June 10, 1986, the United States Magistrate ruled in part that inasmuch as the plaintiff had already established actual malice by the defendants the confidential source would only comprise cumulative evidence. (Appendix C, A-28; Memorandum Opinion, June 10, 1986) In addition, the Magistrate held that should it be determined that actual malice had not been established by the plaintiff, the plaintiff might move for additional discovery to secure the name of the confidential source.

On May 5, 1986 the defendants filed a motion to limit discovery in this case. On May 13, 1986 the Court granted that motion prohibiting the plaintiff from deposing Martha Powers, who had worked at the offices of *The Information Digest* and denying the plaintiff an opportunity to depose the recipients of *The Information Digest*, including those in the intelligence organizations with whom the defendants asserted they maintained close relationships. On June 17, 1986 the defendants moved for summary judgment asserting that actual malice had not been established and that the articles were substantially true.

On July 10, 1986 the plaintiff submitted its opposition to the motion for summary judgment. On July 10, 1986 plaintiff submitted an application pursuant to Rule 56(f) of the Federal Rules of Civil Procedure asserting that it had been denied an adequate opportunity to conduct discovery and seeking permission to have access to the confidential informant relied upon by Rees in writing the March 30, 1984 article, which access had previously been denied due, in part, to the ruling by the Magistrate that such evidence would be cumulative inasmuch as the plaintiff had already established actual malice on the part of the defendants. The Rule 56(f) application also sought permission to depose Martha Powers and others.

On October 3, 1986 the District Court granted the defendants' motion for summary judgment after having marshalled the evidence showing complete reliance upon the assertions made by the defendants and by drawing all inferences favorable to the defendants.

On November 25, 1986 the plaintiff filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia. On January 9, 1987 the appellees moved for summary affirmance. On January 27, 1987 the appellant submitted its opposition to the motion for summary affirmance asserting that the motion was frivolous. On November 9, 1987 the Court of Appeals denied Appellees' Motion for Summary Affirmance stating "[t]his case is not of the character that would be appropriate for summary disposition."

On November 23, 1987 the appellant moved for sanctions, costs and attorney's fees against the appellees and counsel for having submitted a motion for summary affirmance which was frivolous and without merit and interposed to cause unnecessary delay in the prosecution of this appeal.

On December 3, 1987 appellees filed an opposition to the motion for sanctions and on December 10, 1987 the appellant submitted its reply.

On July 29, 1988 the Court of Appeals affirmed the District Court's entry of summary judgment holding that the plaintiff did not demonstrate sufficient evidence of actual malice to permit a reasonable juror to reach that conclusion.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has in this case rendered a decision which conflicts with the applicable decisions of the United States Supreme Court. In *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), this Court enunciated the standard for consideration by the District Court of a motion for summary judgment. In *Anderson* this Court held:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159, 90 S.Ct. at 1608-1609. Neither do we suggest that the trial

> courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).
>
> *Anderson v. Liberty Lobby, Inc.*
> 106 S.Ct. at 2513-14

The District Court and the Court of Appeals have ruled in a manner which stands in direct conflict with the teaching of this Court in *Anderson*. In essence, the District Court and the Court of Appeals have held that the standard enunciated by this Court, that all that is required to survive a motion for summary judgment is the presentation of evidence that the plaintiff established the presence of actual malice with convincing clarity is no longer applicable. It may not be said that a United States Magistrate is more partial and less informed as to the facts and the law than an apocryphal potential juror would be. The United States Magistrate had reviewed the entire relevant record and was more knowledgeable regarding the demeanor of the defendants than was the District Court since the Magistrate had presided over all of the relevant depositions including the depositions of the defendants. Based upon his access and analysis of the entire record the United States Magistrate found that the plaintiff had clearly established actual malice in his judgment. The ruling by the District Court and the Court of Appeals in this case, in essence holds that either the United States Magistrate, in this instance a respected legal scholar who has since been appointed to the Superior Court of the District of Columbia, possessed less ability to analyze the evidence than expected of a potential juror, a concept which is unthinkable, or that the standards enunciated by this Court are to be rejected. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 17, United States Supreme Court Rules.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT NO REASONABLE JUROR COULD CONCLUDE THAT THE PLAINTIFF HAD PRESENTED CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE IN VIEW OF THE PRIOR DETERMINATION OF THE MAGISTRATE THAT PLAINTIFF HAD PRODUCED SUFFICIENT AND SUBSTANTIAL EVIDENCE TO ESTABLISH ACTUAL MALICE

The District Court erred in concluding that no reasonable juror could conclude that the plaintiff had presented clear and convincing evidence establishing the actual malice of the defendants. The burden imposed upon the District court in ruling upon a motion for summary judgment was set forth in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986) which constrained the Court to determine whether a reasonable juror could conclude that actual malice had been established by the plaintiff in a clear and convincing fashion. In this instance the gift of prophecy was not required; a United States Magistrate, assigned to the case by the District Court, became familiar with all of the evidence presented by the defendants through presiding over the depositions of defendants John and Sheila Louise Rees, and in considering and ruling upon various motions. In ruling upon a motion related to discovery the Magistrate denied access to confidential sources to Liberty Lobby, in part because he concluded that Liberty Lobby had already established the existence of actual malice by the defendants to his satisfaction and that, therefore, the evidence sought would have been merely cumulative.

The District Court erred in concluding that no reasonable juror could have concluded that actual malice was present when, in fact, a United States Magistrate in command of all of the relevant evidence, including all of the facts relied upon by the defendants, had previously concluded that actual malice had been established.

Liberty Lobby adduced evidence which demonstrated that the defendants made numerous false and injurious statements about Liberty Lobby and its treasurer, that these statements were vituperative, made with malice and were unfounded. Evidence of the attitude of the defendants toward Liberty Lobby and its treasurer came from the testimony of the defendants and from persons offered by the defendants as their witnesses. The defendants said they relied upon a defamatory statement previously published

which statement had been retracted in full by the original publisher prior the time that the defendants relied upon it. The defendants retreated from their published statements during their testimony and were unable or unwilling to provide any basis for the false and defamatory statements they published about Liberty Lobby, an organization they said they despised and which they sought to destroy. The defendants, in effect, admitted that their published statements were false, were unable to offer any foundation for them, admitted that they had relied upon a withdrawn defamatory statement, admitted that they despised Liberty Lobby and its treasurer but claimed that the false statements which they published were not published with actual malice. Liberty Lobby produced clear and convincing evidence establishing that the statements published by the defendants were false and were made with actual malice.

The District Court, before whom none of the depositions were taken, weighed the evidence, evaluated the credibility of the witnesses, accepted all inferences in favor of the defendants and then resolved the issues, concluding that actual malice had not been established. In doing so the Court was selective, relying upon those portions of the evidence offered by the defendants which supported the case of the defendants and rejecting that evidence offered by the plaintiff and the defendants which supported the plaintiff's case. The conduct of the Court contravened the well-settled law which requires that the Court neither weigh the evidence nor pass on questions of credibility, at this stage of the proceedings, and requires as well that the evidence offered by the non-moving party be credited and reasonable inferences which may be drawn from the evidence in favor of the plaintiff be accepted as true. The District Court also denied to Liberty Lobby a reasonable opportunity to discover evidence which would have further impacted directly upon the actual malice of the defendants in publishing their articles. During the very end of discovery, John Rees contradicted himself and offered a new source for his challenged articles. Liberty Lobby was denied an opportunity to depose the newly named source. During discovery it was learned that a woman apparently worked with the defendants in the promulgation of material. Liberty Lobby was denied an opportunity to depose that witness. In his memorandum opinion, the United States Magistrate denied to Liberty Lobby an opportunity to secure additional evidence based in part upon the holding by the Magistrate that such evidence was cumulative, in that Liberty Lobby had already proven the presence of actual malice. The

Court both found the absence of malice and that Liberty Lobby was to be prohibited from seeking the evidence, denied in part since it was redundant.

In *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), the Supreme Court enunciated the standard for consideration by the District Court of a motion for summary judgment:

> The Court has said that summary judgment should be granted where the evidence is such that it "would required a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed. 2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.
>
> *Anderson v. Liberty Lobby*
> 106 S.Ct. at 2512

In determining whether or not the evidence should be submitted to a jury this Court asserted yet again that the evidence offered by the nonmoving must be believed, that all justifiable inferences are to be drawn in favor of the non-moving party and that determinations as to credibility and the weighing of the evidence are jury functions not those of a judge when he is ruling on a motion for summary judgment. In *Anderson* the Court held:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-

> movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159, 90 S.C.t. at 1608-1609. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).
>
> *Anderson v. Liberty Lobby, Inc.*
> 106 S.Ct. at 2513-14

The law requires the District Court to determine what a reasonable juror might do with the evidence presented to it. Could a reasonable juror, accepting the evidence of the plaintiff as true, and drawing all justifiable inferences from that evidence in favor of the plaintiff, reach the conclusion that the plaintiff had established the presence of actual malice with convincing clarity? In *Anderson*, Justice Brennan in dissent commented upon the unfair burden placed upon the District Court and Courts of Appeal:

> What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and the courts of appeal that must struggle to clean up after us.
>
> *Anderson v. Liberty Lobby, Inc.*
> 106 S.Ct. at 2520
> Justice Brennan Dissenting

In the instant matter, however, no gift of prophecy is required to know what a reasonable mind might conclude when exposed to the evidence in this case. Honorable Arthur L. Burnett, Sr., United States Magistrate, was assigned by the District Court to preside over the depositions of the defendants and to rule upon various pretrial matters. During his deposition on May 23, 1986, John Rees testified before the Magistrate that a defamatory statement published by *The Information Digest* on March 30, 1984 was based in part upon information received from a confidential source. The statement centered upon the allegation that was relevant to the alleged collaboration between Liberty Lobby and the LaRouche organization, an allegation denied by Liberty Lobby. Liberty Lobby asserted that Rees knew that the statements which

he published were false or that he made them with reckless disregard for the truth. When counsel for the plaintiff moved at the deposition session to compel disclosure of the identity of the confidential source, the Magistrate deferred ruling and requested that counsel file legal memoranda on the issue. The Magistrate denied subsequently Liberty Lobby's motion to compel disclosure of the source stating in part that "the Magistrate is of the view that the disclosure of the confidential source is not essential to the plaintiff's case-in-chief." (Appendix C, A-26, Memorandum Opinion, June 10, 1986) In his Memorandum Opinion the Magistrate explained the basis of that ruling:

> The Magistrate is of the view that the plaintiff has sufficient other evidence suggesting fabrication, or at least reckless disregard of the truth based both on alternative sources and plaintiff's counsel's eliciting responses from both John Rees and Sheila Louise Rees, which as a matter of circumstantial evidence, will support arguments of malice, i.e. knowing falsity or reckless disregard of the truth. Counsel for the plaintiff has astutely, during the depositions of the defendants, probed their editorial processes and their state of mind with reference to research, writing and publishing of the two articles at issue in this case, as he was entitled to do under *Herbert v. Lando*, 441 U.S. 153 (1979).
>
> (Appendix C, A-26, Memorandum Opinion, June 10, 1986)

On December 26, 1984 the defendants John Rees and *The Information Digest* moved to dismiss the case and for a more definite statement. Submitted with that motion was a twenty-nine page affidavit signed by John Rees and various other exhibits. The Rees Affidavit was in essence, resubmitted to the District Court by counsel for Rees on June 17, 1986 as the Defendants Statement of Material Facts. Although both Mr. and Mrs. Rees repudiated substantial portions of the Rees Affidavit in their testimony before the Magistrate the affidavit was offered by counsel for the defendants in conjunction with their motion for summary judgment. The Rees Affidavit comprised the entire factual basis for the defense against the evidence that the defendants had published with actual malice. The Rees Affidavit was offered in evidence during the deposition of John Rees and line-by-line, paragraph-by-paragraph, formed the basis for questions put to the defendants during the deposition

presided over by the Magistrate. Thus, the Magistrate became familiar with the entire defense case. It is true that additional evidence was offered to the District Court after the conclusion of the depositions before the Magistrate bearing on the question of actual malice. However, that evidence was offered by the *plaintiff* and further demonstrated the presence of actual malice. After the Magistrate had examined all of the relevant evidence in the case and had presided over all of the depositions of substance, in his Memorandum Opinion he concluded:

> Based on the Magistrate's exposure to this case and hearing the depositions of both John Rees and Sheila Louise Rees, the two principals involved in the publication of the *Information Digest* and the two (2) articles involved in the case, one of March 30, 1984 and the other of March 8, 1985, it appears that the plaintiff already has substantial evidence to establish knowing falsity or reckless disregard of the truth, and pursuing these alternative sources would lead at this point in time only to cumulative evidence. Of course, the Magistrate does not intend to prejudge the merits of this case, but at argument on June 4, 1986 counsel for the plaintiff did acknowledge that he felt he had a *prima facie* case against the defendants. If the Magistrate is wrong in this assessment of the case, counsel can ask for a brief extension of the discovery completion date of June 6, 1986 by filing a motion to be acted upon by the Court (Revercomb, J) setting forth good cause for a brief extension of discovery and the names of those alternative source individuals they now wish to depose and a statement of the importance of their depositions at this stage of the case.
>
> (Appendix C, A-28, Memorandum Opinion, June 10, 1986)

Liberty Lobby does not contend, as incorrectly implied by counsel for the appellees in his motion for summary affirmance (Motion for Summary Affirmance, pp. 8-9) and repeated by the Court of Appeals, that the Magistrate had been designated to hear and determine a motion for summary judgment. Reason compels the conclusion that if a United States Magistrate, fully familiar with the issues in the case and with the applicable law, who has presided over all of the depositions of substance in the case, and who has reviewed all of the relevant arguments and documents in the case over a period of more than half a year, has concluded that actual malice has been established by the plaintiff to his satisfac-

tion, it is not possible to assert that a reasonable mind could not reach the same conclusion. In this unusual circumstance, unlike other instances where the District Court is constrained to rule on a motion for summary judgment, it is not necessary for the Court to predict what a reasonable juror might possibly make of the evidence. In this case, an impartial jurist in possession of all of the relevant facts, law and arguments who also, unlike the District Court had the opportunity to witness the repeated perjury of the defendants as well as statements offered by them which demonstrated their feelings of contempt, vituperation and malice toward the plaintiff, concluded that actual malice had been demonstrated, and published that finding on two separate occasions in a memorandum opinion.

CONCLUSION

For the foregoing reasons, this petition for writ of *certiorari* should be granted.

October 27, 1988

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States District Court

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 8, 1988 Decided July 29, 1988

No. 86-7091

LIBERTY LOBBY, INC., APPELLANT

v.

JOHN REES, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 84-03452)

Mark Lane, for appellant.

David J. Branson, for appellees.

Before: MIKVA and RUTH B. GINSBURG, *Circuit Judges*, and EDWARD D. RE*, *Chief Judge*, United States Court of International Trade.

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Chief Judge* RE.

RE, *Chief Judge*: In this libel action, appellant, Liberty Lobby, Inc., appeals from an order of the United States District Court for the District of Columbia which granted appellees' motion for summary judgment. Liberty Lobby charged that the appellees John Rees, Sheila Louise Rees, and *Information Digest* libeled it by publishing two articles in *Information Digest* which contained false and defamatory statements about Liberty Lobby. The district court held that Liberty Lobby failed to establish that a reasonable trier of fact could find, by clear and convincing evidence, that the appellees published either of the two articles with actual malice.

Liberty Lobby urges three grounds in support of its contention that the district court erred in holding that a reasonable jury could not find actual malice by clear and convincing evidence: (1) in the course of denying a discovery motion made by Liberty Lobby, the Magistrate stated that Liberty Lobby already had "substantial evidence to establish knowing falsity"; (2) two of the Reeses' sources denied giving them information supporting the accusations made against Liberty Lobby; and (3) the Reeses relied upon a published article which the publisher previously had retracted. Liberty Lobby also contends that the district court erred in failing to grant its motion, made pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, for permission to extend discovery, and to depose certain confidential informants.

The question presented is whether the district court erred in holding that Liberty Lobby failed to show that a reasonable jury could find, by clear and convincing evidence, that the appellees acted with actual malice in their publication of the two articles. Based on facts in the record that are not genuinely in dispute, we hold that a reasonable jury could not find, by clear and convincing evidence, that the Reeses published the articles

with knowing falsity, or with reckless disregard for the truth or falsity of statements made in them. Accordingly, we affirm the decision of the district court.

BACKGROUND

In March 1984, *Information Digest*, a biweekly newspaper written and published by John Rees and Sheila Louise Rees, published an article entitled "The LaRouche Aparatus [sic] in the U.S." The article chronicles Lyndon LaRouche's involvement with various organizations, such as Students for a Democratic Society, the Communist Party U.S.A., and Liberty Lobby. It also describes publications controlled by LaRouche, and organizations operated by him, including the National Caucus of Labor Committees, the United States Labor Party, and the National Democratic Policy Committee. The article characterizes LaRouche as Marxist, communist, extremist, anti-Semitic, and revolutionary. It describes Liberty Lobby and its founder and treasurer, Willis A. Carto, as anti-Semitic.

On November 14, 1984, Liberty Lobby filed suit for libel against John Rees and *Information Digest* in the United States District Court for the District of Columbia. Liberty Lobby alleged that the article defamed it by asserting falsely that Liberty Lobby was closely linked with LaRouche and his organization, and that "some of LaRouche's more unsavory alleged activities were set in motion as a result of an arrangement with Liberty Lobby." In addition, Liberty Lobby contended that the article falsely asserted that the LaRouche organization was "given the run" of the offices maintained by the *Spotlight*, a weekly newspaper published by Liberty Lobby. Liberty Lobby contended that the article "libelously damages Liberty Lobby through the technique of guilt by association. . . . The overall effect of the article is untruthfully to place Liberty Lobby among what the article characterizes as disreputable company."

In January 1986, Liberty Lobby moved to amend and supplement its complaint by naming Sheila Louise Rees a defendant, and adding a second cause of action alleging that an article in the March 8, 1985 issue of *Information Digest*, entitled "The Populist Party," also contained false and defamatory statements about Liberty Lobby.

The Populist Party article, written by Sheila Louise Rees, discusses the formation, activities, and philosophy of the Populist Party, and describes the role of Liberty Lobby and various individuals associated with it in the Populist Party. The article characterizes Liberty Lobby and its founder and treasurer, Willis A. Carto, as "racialist and anti-Semitic," and refers to the "long-term relationship of the Lyndon H. LaRouche organization with Carto's network."

On May 30, 1986, Liberty Lobby moved to compel John Rees to reveal the identity of a confidential source. United States Magistrate Arthur L. Burnett denied the motion because Liberty Lobby had not shown the requisite need. In passing, the Magistrate stated that "it appears that the plaintiff already has substantial evidence to establish knowing falsity or reckless disregard of the truth, and pursuing these alternative sources would lead . . . only to cumulative evidence." *Liberty Lobby, Inc. v. Rees*, No. 84-3452, slip op. at 10-11 (D.D.C. June 10, 1986).

On June 17, 1986, the Reeses moved for summary judgment on the grounds that the articles were published without actual malice and were substantially true. In July 1986, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, Liberty Lobby requested leave to conduct additional discovery, and sought access to confidential informants. On October 3, 1986, the district court granted the Reeses' motion for summary judgment. *Liberty Lobby, Inc. v. Rees*, 667 F. Supp. 1, 6 (D.D.C. 1986).

In granting the Reeses' motion for summary judgment, the district court stated that it was applying the standard established by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Under that standard, on a motion for summary judgment in a defamation action, the court must determine "whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." 477 U.S. at 257. After reviewing the record, the district court concluded that "there is de minimis evidence that the defendants published their article with knowing falsity or reckless disregard of the truth or falsity of the assertions in those articles." *Liberty Lobby*, 667 F. Supp. at 3.

Liberty Lobby appealed the order of the district court, and the Reeses moved for summary affirmance. This court denied the Reeses' motion, and Liberty Lobby moved for sanctions, costs, and attorneys' fees pursuant to this court's General Rule 23, and Rule 38 of the Federal Rules of Appellate Procedure. A ruling on Liberty Lobby's motion was deferred pending oral argument. Because the application for summary affirmance was not frivolous, and complied with the rules governing proceedings in this court, Liberty Lobby's motion for sanctions, costs, and attorneys' fees is denied.

DISCUSSION

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), the Supreme Court held that a public official is prohibited from "recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Supreme Court extended the "actual malice" standard to apply to statements made about "public figures." *See id.* at 154-55. Liberty Lobby concedes that it is a "public figure" for

the purposes of this defamation action. *Liberty Lobby*, 667 F. Supp. at 2. Therefore, it must establish, by "clear and convincing proof," that the Reeses made the allegedly defamatory statements with "actual malice." *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Furthermore, the first amendment requires that a public figure bear the burden of proving the falsity of a defamatory statement, as well as actual malice. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986). The requirements of showing "clear and convincing proof" of actual malice, and a preponderance of evidence of falsity are also "applicable when considering a motion for summary judgment." *See Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292-93 (D.C. Cir. 1988); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be entered against a party who fails to present sufficient evidence "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Hence, the trial court may properly grant summary judgment if there are no "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

In *Anderson*, the Supreme Court held that "where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson*, 477 U.S. at 255-56 (footnote omitted). Hence, to defeat summary judgment Liberty Lobby was required to show that the evidence could support a reasonable jury

finding, by clear and convincing evidence, that the defendants acted with actual malice in publishing the two articles in *Information Digest*.

In determining whether a party moving for summary judgment has made a showing that there are no triable issues of fact, a court must view all inferences to be drawn from the underlying facts "in the light most favorable to the party opposing the motion." *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2727 (1983). Since the grant or denial of summary judgment is a determination of law rather than one of fact, we need not defer to the district court's conclusions and reverse only if clearly erroneous, but rather, may review the matter de novo. *See Nepera Chem., Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688, 699 (D.C. Cir. 1986). Furthermore, in cases which implicate first amendment issues, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 284-86). This standard of review also applies to decisions of summary judgment in libel actions. *See Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d at 1293; *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

On this appeal, Liberty Lobby maintains that a United States Magistrate in possession of all of the relevant evidence concluded that actual malice had been established. Hence, according to Liberty Lobby, the district court erred in holding that no reasonable juror could have determined that the Reeses acted with actual malice. Liberty Lobby reads too much into the Magistrate's statement. During discovery, Liberty Lobby moved to

compel the Reeses to disclose a confidential source. The Magistrate denied the motion on the grounds that Liberty Lobby had neither exhausted alternative sources for the information nor shown a compelling need for disclosure of the name, since its only value was to impeach the credibility of defendants John and Sheila Rees. *Liberty Lobby, Inc. v. Rees*, No. 84-3452, slip op. at 10 (D.D.C. June 10, 1986). Liberty Lobby underscores the Magistrate's comment that, in his view, "the plaintiff has sufficient other evidence suggesting fabrication, or at least reckless disregard of the truth based both on alternative sources and plaintiff's counsel's eliciting responses from both John Rees and Sheila Louise Rees, which as a matter of circumstantial evidence, will support arguments of malice, i.e., knowing falsity or reckless disregard of the truth." *Id.*, slip op. at 8.

The Magistrate, we emphasize, specifically cautioned that his observation or statement was not intended to "prejudge the merits of this case . . . ." *Liberty Lobby*, No. 84-3452, slip op. at 11. The Reeses also point out that the Magistrate did not review all of the evidence showing their reliance on previously published sources, but heard only Liberty Lobby's questioning of the Reeses at their depositions. Furthermore, the Magistrate had no need to consider the "clear and convincing" standard of actual malice in settling the discovery dispute. Hence, the district court was correct in noting that "[t]his issue and standard were not before the Magistrate," and that his statements were not binding on the court. *Liberty Lobby*, 667 F. Supp. at 5; *see* 28 U.S.C. § 636(b)(1)(A) (1982). Moreover, the district court identified the correct standard, and expressly stated that, "the Court iterates that its mandate is to examine the entire record before it and to apply a clear and convincing standard." *Liberty Lobby*, 667 F. Supp. at 5.

Liberty Lobby also submits that, on the basis of the affidavits of James D. Tucker and Stanley Rittenhouse,

a reasonable jury could find clear and convincing evidence of actual malice: the affiants are cited as sources for the articles, but, in their affidavits, they deny giving John Rees information as to the relationship between Liberty Lobby and Lyndon LaRouche, and deny providing support for the charge of anti-Semitism. Liberty Lobby contends that this conflict in the testimony raises issues of credibility suitable for a jury, and suggests actual malice.

The district court, with respect to this matter, stated that "the clear and convincing evidence standard on the state of mind of the defendants must be viewed from the entire record," *Liberty Lobby*, 667 F. Supp. at 3, and concluded that the record revealed that Liberty Lobby's "own writings . . . negate any clear evidence of malice. Those written expressions and some overt actions by plaintiff as well as the defendant's [sic] attribution to other sources, cause the plaintiff's evidence to fall far short of the clear and convincing standard." *Id.*

Even if we were to assume that the statements made by affiants were true, they would not alter the Reeses' uncontested showing that the published articles were based on documented evidence. It has been stated that "defamation defendants will not be forced to defend, nor will a trial judge in a later libel case have to retry, the truthfulness of previous reports made by independent publishers." *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 862 (5th Cir. 1978). *See also Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d at 1297-98 (no actual malice in Wall Street Journal charge that Liberty Lobby is anti-Semitic).

As stated by the district court, the Reeses provided a multitude of sources on which they relied to support both the characterization of Liberty Lobby as anti-Semitic, and the asserted relationship between LaRouche and Loberty Lobby. In support of their allegation that

Liberty Lobby was racist and anti-Semitic, the Reeses submitted the following items, among others: (1) a statement by Congressman Larry McDonald which described Liberty Lobby as "an organization founded by Willis Carto who seeks to use American populist causes as the method to bring about a National Socialist (Nazi) regime." 127 Cong. Rec. 380-381 (1981); (2) an article in the September 10, 1971 issue of *National Review* that contained an excerpt from a letter written by Willis Carto, which states that the international Jews, by their "propaganda, lies and demands . . . blinded the West as to what [Hitler's] Germany was doing"; (3) two reports in *Extremism on the Right*, by the Anti-Defamation League of B'nai B'rith, that described Liberty Lobby as "the best-financed anti-Semitic organization in the United States"; (4) an introduction written by Willis Carto to the book *Imperium*, which was sold and advertised by Liberty Lobby, and which contained passages such as "the Jew is a product of another Culture," and "the Negro is below our Culture"; (5) an article in *Our Town* that described Liberty Lobby as "a rabidly anti-Semitic outfit"; (6) a *New York Times* article which noted that the U.S. Labor Party's "anti-Semitic turn" could be traced to its contact with Liberty Lobby's *Spotlight*; and (7) the observation of then Circuit Judge Warren E. Burger that Liberty Lobby supports "various programs of 'political education,' some of which contain overtones of anti-Semitism and racism . . . ." *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 n.7 (D.C. Cir. 1968).

Liberty Lobby also argues that summary judgment was improper since: (1) the Reeses' reliance on Congressman McDonald's remarks was inappropriate because Sheila Rees previously had worked for the Congressman; and (2) the Reeses' reliance on the *National Review* article, and Carto's introduction to *Imperium* was inappropriate because Liberty Lobby is distinct from Willis Carto.

Liberty Lobby's argument that the Reeses "laundered" their views through Congressman McDonald must fail because the Congressman did not rely exclusively on the Reeses as sources, and the conclusions he formed on Liberty Lobby were his own. Finally, since Willis Carto is the founder and treasurer of Liberty Lobby it was not unreasonable for the Reeses to conclude that Liberty Lobby shared his views.

To establish the relationship between Liberty Lobby and LaRouche, the Reeses submitted the following items, among others: (1) a *National Review* article written by former Labor Party member Gregory Rose, which made reference to "intimate ties" between LaRouche and Liberty Lobby; (2) a letter from Congressman McDonald to Colonel Dall of Liberty Lobby stating that Liberty Lobby and the *Spotlight* have collaborated with the U.S. Labor Party; (3) a letter written by James Tucker, former editor of the *Spotlight*, reporting that he had been ordered to publish stories favorable to the U.S. Labor Party; (4) a *New York Times* article which made reference to Liberty Lobby as the "first right wing contact" to one of LaRouche's organizations; (5) Liberty Lobby's memorandum of January 10, 1980, on LaRouche's U.S. Labor Party, which was also published in the *Spotlight*; (6) the *Spotlight*'s October 11, 1976 review of the U.S. Labor Party's book, *Carter and the Party of International Terrorism*, published with an advertisement for the book through Liberty Lobby; and (7) Liberty Lobby's republication of an article from the LaRouche publication *Investigative Leads*.

In addition to these published sources, the Reeses relied on numerous interviews with individuals, including Kevin Lynch, articles editor of *National Review*, and Dennis King, author of the *Our Town* series on LaRouche.

Liberty Lobby's only argument of any weight at all derives from one sentence in the over 40-page single-

spaced John Rees report: "Scott Thompson and others from the LaRouche operation were given the run of *Spotlight*'s Capitol Hill offices and produced material for that publication." *See The LaRouche Aparatus* [*sic*] *in the U.S.*, 17 Information Digest 79 (1984). Actually, the *Spotlight* reproduced two versions of an article which originally appeared in the LaRouche publication *Investigative Leads*. The article entitled "Queer Ideas Pushed in U.S." appeared in the September 3, 1984 issue of the *Spotlight*, and another version of the article entitled "International Perverts Push Queer Ideas in United States" appeared in the *Spotlight* 4 months later. Although the link to LaRouche was not indicated specifically, both articles bore the by-line "From 'Investigative Leads.'"

As a source for the statement that "the LaRouche people" were "given the run" of the *Spotlight*'s offices, John Rees cited the report in *National Review* that "Thompson [from LaRouche's organization] met regularly with Carto [Liberty Lobby's founder] through 1975 and 1976." The statement "given the run" may suggest more than regular meetings, and may go beyond journalistic exaggeration or embellishment. Nevertheless, minor inaccuracies will not give rise to a defamation claim when the ultimate defamatory implications are themselves not actionable. *See Tavoulareas v. Piro*, 817 F.2d 762, 788 (D.C. Cir.) (en banc), *cert. denied*, 108 S. Ct. 200 (1987); *see also* Restatement (Second) of Torts § 581A comment f, at 237 (1977). Furthermore, actual malice is not established in cases in which the statement is substantially accurate. *See Tavoulareas*, 817 F.2d at 787-88 (no actual malice in alleging "direct link" between two companies with no formal ties, where numerous other connections made the statement substantially accurate).

It is evident that the Reeses offered numerous published documents to support their charge that Liberty

Lobby associated with the LaRouche organization. Hence, the statement cited by the plaintiff as inaccurate cannot be isolated from its context, and does not constitute a separate and distinct defamation. Liberty Lobby also argued that the Reeses improperly relied on an article published in *National Review*, which had retracted its allegations of "intimate ties" linking Liberty Lobby to LaRouche. The retraction, however, involved only one sentence, and did not affect the description of the ties between the two groups.

Lastly, Liberty Lobby asserts that John Rees became angry after Rittenhouse refused to state in his interview that Liberty Lobby and LaRouche had a close relationship. Liberty Lobby contends that Rees' action demonstrates his "animosity and hatred" for Liberty Lobby and supports its claim of actual malice. The law is clear, however, that "[a]n adversarial stance is fully consistent with professional, investigative reporting" and is "not indicative of actual malice." *Tavoulareas*, 817 F.2d at 795.

Liberty Lobby also challenged the district court's failure to grant its application, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, to depose Dennis King, author of an article in *Our Town*, and Martha Powers, who had typed some business letters for the Reeses and was also their landlady. The record shows that Liberty Lobby had known for 2 years that the *Our Town* article was a source for the Reeses' articles, and that at most, Martha Powers played a minor role in this dispute. In light of the lengthy and exhaustive discovery period, the district court's denial of appellant's motion was not an abuse of discretion.

We need not burden this opinion by further recitations from the record, for the absence of sufficient evidence of actual malice is strikingly apparent. The Supreme Court has emphasized that actual malice is not ill will or per-

sonal spite; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. *See Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82-83 (1967). The test for the reckless disregard of the truth is not whether a reasonably prudent person would have published the statement, but rather, whether there is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

CONCLUSION

After a thorough review of the record, we hold, in agreement with the district judge, that Liberty Lobby did not demonstrate the existence of sufficient evidence to permit a reasonable jury finding, rooted in clear and convincing proof, that the statements were made with knowledge that they were false, or with reckless disregard of whether or not they were true. Accordingly, the district court's entry of summary judgment against Liberty Lobby is affirmed.

APPENDIX B

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed Oct. 3, 1986
CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.	:	
	:	
Plaintiff	:	
	:	
v.	:	C.A. 84-3452
	:	
JOHN REES, SHEILA LOUISE REES and THE INFORMATION DIGEST,	:	
	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendants' motion for summary judgment and the plaintiff's opposition thereto. Oral argument was heard July 21, 1986.

This is a defamation action, commenced on November 14, 1984 by plaintiff, a not-for-profit corporation and self-described "citizens' lobby".

The plaintiff filed this diversity libel action in the United States District Court for the District of Columbia alleging that various statements in each of two articles published by the defendants were defamatory.

Named as defendants were John Rees, publisher and editor of *Information Digest*, Sheila Louise Rees, an editorial assistant and writer for *Information Digest* and *Information Digest* itself, a bi-weekly magazine published in Baltimore, Maryland.

Information Digest is distributed to many newspapers and magazines throughout the country and to various law enforcement agencies including police departments and the Bureau of Alcohol, Tobacco and Firearms.

The alleged defamation of which plaintiff complains appeared in two separate issues of Information Digest—March 30, 1984, and March 8, 1985, (hereinafter "the 1984 article" and "the 1985 article" respectively).

The 1984 article was entitled "The LaRouche Apparatus in the U.S." and it dealt with Lyndon LaRouche and various organizations allegedly operated by LaRouche. The article portrayed LaRouche as "espousing Marxist, communist, extremist, paranoid, anti-semitic, revolutionary views" (Plaintiff's Second Amended and Supplemental Complaint p. 3) and then, plaintiff alleges, "promulgates the false assertion that Liberty Lobby, Inc. and LaRouche are closely linked and allied, and even that some of LaRouche's more unsavory alleged activities were set in motion as a result of an arrangement with Liberty Lobby."

Thus plaintiff alleges the article damages it "through the technique of guilt by association" and that defendants "falsely imply that all evils they attribute to LaRouche are tolerated by, shared by and to some extent caused by Liberty Lobby." The overall effect of the article, plaintiff concludes, is "untruthfully to place Liberty Lobby among what the article characterizes as disreputable company."

The 1984 article, plaintiff contends, is further defamatory in that it characterizes plaintiff as "race-hating, anti-semitic, totalitarian (and) of the National Socialist model." (Second Amended and Supplemental Complaint p. 6) These alleged libels of Liberty Lobby were also raised in the context of the relationship between Lyndon LaRouche and Liberty Lobby.

The 1985 article, entitled "The Populist Party", according to plaintiff, also imposes liability for defamation in that it too characterizes Liberty Lobby as racialistic, anti-semitic and neonazi and further asserts the existence of a long-term relationship between Liberty Lobby and LaRouche.

The plaintiff's status in a defamation action has previously been litigated by the Courts in this Circuit.[1] There is nothing in the record in this case to suggest the status of plaintiff has changed. Plaintiff has had "a full and fair opportunity to litigate the issue of its public figure status. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation* 402 U.S. 313, 329 (1971). In this case plaintiff is a public figure for defamation action purposes.[2]

In this most recent term the United States Supreme Court held in *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986) that a court, in ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, must apply

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[1]In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *aff'd on other issue* 106 S. Ct. 2505 (1986), the Court of appeals noted that plaintiff is a public figure stating that Liberty Lobby (and Willis Carto) does "not question the District Court's ruling that they were so called limited purpose public figures, and that the alleged libels pertained to the area in which they held this status." 746 F.2d at 1569.

In the Anderson action, the District Court relying on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) found Liberty Lobby, as a political lobbyist not to be a public figure for all purposes and in all contexts, but a public figure who has voluntarily injected himself or is drawn into a particular public controversy, and thus a public figure for a limited range of issues.

Similarly, in *Liberty Lobby, Inc. v. National Review* (Div. Action No. 80-1067, slip op. J. Joyce Hens Green) Liberty Lobby conceded that it is a public figure for defamation action purposes.

[2]As plaintiff is a public figure this Court must apply the *New York Times v. Sullivan*, 376 U.S. 254 (1964) actual malice test.

In *New York Times*, the Court held that a public official would be prohibited from recovering damages for a defamatory falsehood unless he proves that the statement was made with 'actual malice'--"that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

It is now well established that the constitutional actual malice element is required in cases involving public figures as well as cases involving public officials. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 336, n.7 (1974).

the clear-and-convincing evidence standard. The Supreme Court in *Anderson* promulgated the following test for this Court to apply:

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

106 S. Ct. at 2513.

The Supreme Court further elaborated that:

> Consequently, where the *New York Times* 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury could reasonably find for either the plaintiff or the defendant. Thus where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

106 S. Ct. at 2514.

As this case nears the two-year mark, many depositions have been taken, many affidavits have been filed and the record is heavily weighted with documentary evidence, much of it the publications and writings of both the plaintiff and the defendants. Discovery has been exhaustive.

After a review of this record the Court concludes that there is deminimis evidence that the defendants published their article with knowing falsity or reckless disregard of the truth or falsity of the assertions in those articles.

The primary argument of plaintiff is that a reasonable jury, on the basis of the affidavits of James D. Tucker (Pl's Exhibit A) and Stanley Rittenhouse (Pl's Exhibit H), could find clear and convincing evidence of malice on the part of defendants. These affidavits place in dispute what the affiants said to the defendant, John Rees, in interviews pertaining to the relationship between plaintiff and LaRouche. Under the *Anderson* test, issues of credibility certainly remain jury questions. However, the clear and convincing standard on the state of mind of the defendants must be viewed from the entire record. And it is the plaintiff's own writings which negate any clear evidence of malice. Those written expressions and some overt actions by plaintiff as well as the defendant's attribution to other sources, cause the plaintiff's evidence to fall far short of the clear and convincing standard.

On the assertion of the relationship between Liberty Lobby and LaRouche, the record shows the following:

1. On May 24, 1977 Congressman Larry McDonald wrote a letter to Colonel Dall of Liberty Lobby station: "Liberty Lobby and *Spotlight* (Liberty Lobby Newspaper) have collaborated with a Marxist-Leninist organization called the National Caucus of Labor Committees, also known as the U.S. Labor Party" (LaRouche's organization). (000250 of Appendix B to affidavit of John Rees)

2. In a letter from *Spotlight* editor Jim Tucker to Congressman Larry McDonald, reprinted in *Congressional Record*, Marcy 16, 1982, Tucker states: My struggle began with direct orders to publish stories reflecting favorably on the Labor Party which had made statements which some people at Liberty Lobby appreciated." (Defendant's Exhibit 16)

3. A March 1979 article in the *National Review* written by former U.S. Labor Party member Gregory Rose made reference to the LaRouche organization's "intimate ties with Willis Carto's Liberty Lobby." (Defendant's Exhibit 11)

4. A *New York Times* article of October 8, 1979 written by Paul Montgomery of that newspaper made reference to Liberty Lobby as one of the LaRouche organization's "first right wing contacts." As to defendant's state of mind, the Court notes that in the 1984 article, defendant Rees, attributed the material to the New York Times.

5. A January 10, 1980 position paper issued by Liberty Lobby stated that the USLP should "qualify" for a "political alliance." (Defendant's Exhibit 16)

6. In the September 9, 1981, edition of the *Congressional Record* Congressman Larry McDonald published a statement in which he made reference to the September 7, 1981 issue of *Spotlight*. McDonald stated: "Much of the *Spotlight* article appears to have been lifted from the writings of the LaRouche cult..." McDonald further stated: "*Spotlight's* copying of the LaRouche material is obvious..." and then stated "But why should Liberty Lobby, which claims to be both patriotic and anti-communist, jump in on LaRouche's side?" (Defendant's Exhibit 13)

7. Liberty Lobby promoted and sold copies of U.S. Labor Party books *Dope, Inc.* and *Carter and the Party of International Terrorism* (Defendant's Exhibit 37, Page 13 of Plaintiff's Response to Defendant's First Set of Interrogatories)

8. The September 3, 1984, issue of *Spotlight* reprinted an article from a LaRouche publication *Investigative Leads* entitled "Queer Ideas Pushed in U.S."

On the issue of actual malice in alleging Liberty Lobby's racism, anti-semitism and neo-nazism the record discloses that:

1. In January, 1981, in the *Congressional Record* Congressman McDonald described Liberty Lobby as "an organization founded by Willis Carto who seeks to use American populist causes as the method to bring about a National Socialist (Nazi) regime." (Defendant's Exhibit 7).

2. An article in the September 10, 1971 issue of *National Review* contains an excerpt from a letter written by Willis

Carto which states in part: "Hitler's defeat was the defeat of Europe. And America. How could we have been so blind? The blame it seems must be laid at the door of the International Jews. It was their propaganda, lies and demands which blinded the West as to what Germany was doing." (Defendant's Exhibit 8)

3. A report by the Anti-Defamation League of B'nai B'rith entitled *Extremism on the Right* states: "Liberty Lobby, self-described as a 'pressure group for patriotism,' is the best-financed anti-semitic organization in the United States." (Defendant's Exhibit 9)

4. Willis Carto wrote the 35-page introduction for a 1983 edition of Francis P. Yockey's book *Imperium*. Passages from that book state that "the Jew is a product of another Culture," and that "the Negro is below our Culture." (Defendant's Exhibit 5)

5. In *Liberty Lobby v. Pearson*, 390 F.2d 489, 491 n.7 (D.C. Cir. 1968) Judge Burger stated that Liberty Lobby's materials contained racist and anti-semitic matter.

Other than the credibility issue raised by the two affidavits, nothing that plaintiff has proffered indicates that defendants researched, wrote and published their article in "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1966).

In examining the salient facts in this case which would tend to prove or disprove the existence of actual malice on the part of defendants the Court concludes that any evidence of actual malice falls far short of the clear and convincing standard.

Clear and convincing evidence has been defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations sought to be established." See, *Hobson v. Eaton*, 399 F.2d 781, 784 A.2 (6th Cir. 1968). "It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Id.*

"Whether evidence is clear and convincing requires weighing, comparing, testing, and judging it when considered in connection with all the facts and circumstances in evidence" 30 Am. Jur. *Evidence* Sec. 1167 (1967).

It would appear that in making the editorial decision to write that a relationship existed between Liberty Lobby and the LaRouche organization, that defendants reasonably relied on the above salient representations of facts.

The defendants had before them a panoply of documents some of them Liberty Lobby's, others being national newspapers and magazines. A former U.S. Labor Party Member had described in a *National Review* article the "intimate ties" between the two organizations. A Liberty Lobby position paper stated that the U.S. Labor Party should qualify as a political ally of Liberty Lobby. The late Congressman Larry McDonald on at least two separate occasions asserted the collaboration of Liberty Lobby and *Spotlight* with the U.S. Labor Party. The former editor of *Spotlight* acknowledged that he published favorable articles on the U.S. Labor Party on direct orders from his superiors.

This Court's mandate is to examine all the facts and circumstances in the record before it. The facts in this record could not produce in a reasonable juror's mind firm belief or conviction as to the existence of actual malice. There was a sufficient basis upon which defendant could reasonably infer the existence of a close relationship between Liberty Lobby and the LaRouche organization.

The Court notes that in his Memorandum Opinion of June 10, 1986, on a discovery related issue, Magistrate Arthur Burnett stated that in his view, "the plaintiff has sufficient other evidence suggesting fabrication, or at least reckless disregard of the truth based both on alternative sources and plaintiff's counsel's eliciting responses from both John Rees and Sheila Louise Rees, which as a matter of circumstantial evidence, will support arguments of malice, i.e. knowing falsity or reckless disregard of the truth." Memorandum Opinion

6/10/86 at p. 8. The Magistrate added that "it appears that the plaintiff already has substantial evidence to establish knowing falsity or reckless disregard of the truth..." Memorandum Opinion at pp. 10–11.

The Magistrate's discovery observations notwithstanding, the Court iterates that its mandate is to examine the entire record before it and to apply a clear and convincing standard. This issue and standard were not before the Magistrate.

There is no clear and convincing evidence in this record that defendants had a "high degree of awareness of...probable falsity," *Garrison v. Louisiana* 379 U.S. 64, 74 (1964), or that defendants had "in fact entertained serious doubts as to the truth of (their) publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). On the contrary, defendants have proffered affirmative evidence tending to show that the articles were published in good faith and without actual malice. The defendants consulted many previously published accounts of plaintiff's anti-semitism, racism and neo-nazism and of plaintiff's relationship with Lyndon LaRouche and his organization.

On August 18, 1986, this Court stated from the bench that the defense of substantial truth was an additional ground for granting defendants' motion for summary judgment as to the allegation of anti-semitism. Upon reconsideration the Court does not enter such a finding. However, the extensive record before Judge Jackson in *Liberty Lobby, Inc. v. Dow Jones & Co.*, No. 84-3455 slip op. (D. D.C. July 10, 1986) led that Court to hold that Liberty Lobby was an anti-semitic organization. Although the record in this case would also support such a finding this Court need only apply to all allegedly defamatory statements the clear and convincing standard of actual malice.

This court concludes, by applying the test in *Anderson*, that plaintiff cannot show to a reasonable trier of fact by clear and convincing evidence that defendant published either of its two articles with actual malice—that is, with knowledge of its falsity or with reckless disregard for whether it was false or not.

Accordingly, defendant's Motion for Summary Judgment is GRANTED.

_____

George H. Revercomb, Judge

_____

Date

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APPENDIX C

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed Jun. 10, 1986
CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.	:	
	:	
Plaintiff	:	
	:	
vs.	:	C.A. No. 84-3452
	:	
JOHN REES, et. al.	:	
	:	
Defendants.	:	

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MEMORANDUM OPINION

In the course of oral deposition before the United States Magistrate, defendant John Rees, on May 23, 1986, testified

that an alleged defamatory statement in the article in the *Information Digest* of March 30, 1984 concerning the relationship between Liberty Lobby, Inc., Willis Carto, the founder of Liberty Lobby, Inc., and *Spotlight*, then published by Liberty Lobby, Inc. and Lyndon LaRouche's various organizations, was, in part, based on information received from

Further, the Magistrate is of the view that disclosure of the confidential source is not essential to the plaintiff's case-in-chief. The Magistrate is of the view that the plaintiff has sufficient other evidence suggesting fabrication, or at least reckless disregard of the truth based both on alternative sources and plaintiff's counsel's eliciting responses from both John Rees and Sheila Louise Rees, which as a matter of circumstantial evidence, will support arguments of malice, i. e. knowing falsity or reckless disregard of the truth. Counsel for the plaintiff has astutely, during the depositions of the defendants, probed their editorial processes and their state of mind with reference to the research, writing and publishing of the two articles at issue in this case, as he was entitled to do under *Herbert* v. *Lando*, 441 U. S. 153 (1979).

The Magistrate also notes, with reference to the many other statements of an alleged supportive relationship between Liberty Lobby, Inc. and the LaRouche organizations, John Rees's affidavit of December 24, 1984 revealed numerous names of individuals who purportedly had information about the alleged relationship. From the affidavit and the prior deposition testimony of John Rees, there appears to be still alive at least 10–12 such individuals, some of whom it appears counsel for the plaintiff have already interviewed. At the continued deposition session of June 4, 1986 and during argument by counsel on the issue of alternative sources, the Magistrate asked why these alternative sources had not been deposed previously, and counsel for the plaintiff responded that it is customary to complete the deposition of the defendant or defendants first, and counsel had been frustrated in this endeavor by the delaying tactics of the defendants and their counsel and their claims of privileges, which had led to the deposition sessions being conducted before the Magistrate. While the Mag-

istrate finds this explanation reasonable, it is not sufficient to override a valid claim under the First Amendment to protect confidential sources. Where alternative sources exist, they must be pursued first before the court will require disclosure of a confidential source. As our Court of Appeals stated in *Zerilli* v. *Smith*, 656 F.2d 705, 713 (D. C. Cir. 1981), a plaintiff must exhaust every reasonable alternative source of information first. *See also, Carey* v. *Hume*, 492 F. 2d at 639, where the Court of Appeals suggested that as many as 60 depositions might be a reasonable alternative. *See also Dowd* v. *Calabrese*, 577 F. Supp. 238, 245 (D.D.C. 1983); *Liberty Lobby, Inc.* v. *Anderson*, 96 F.R.D. 10, 12 n. 2 (D.D.C. 1982). Of course, it would appear that this case would not require such an exhaustive exercise.

Thus, in conclusion, the foregoing judicial precedent requires, in order to compel the disclosure of the identity of a confidential source of a journalist or reporter, in balancing the interests involved under *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), 1) the information be relevant, 2) the information can not be obtained by alternative means, and 3) there is a compelling need for the information in that it is crucial to the plaintiff's case, and without it, the reporter or journalist would be effectively shielded from liability. The old Fifth Circuit had described the test perhaps in even tighter language as follows:

> Before receipt of such information the plaintiff must show: substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.

Miller v. *Transamerican Press, Inc.*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U. S. 1041 (1981). *See also LaRouche v. National Broadcasting Co., Inc.* 780 F.2d 1134, 1139 (4th Cir. 1986); *Laxalt* v *McClatchy*, 622 F. Supp. 737, 749 (D. Nev. 1985). In this case plaintiff has failed to meet the requirements

of two components of the three-part test, i. e., it has not exhausted alternative sources and the disclosure is not compelling in that it goes to a matter at most collateral and only potentially of some impeachment value in further undermining the credibility of John Rees and Sheila Louise Rees in this case.

Based on the Magistrate's exposure to this case and hearing the depositions of both John Rees and Sheila Louise Rees, the two principals involved in the publication of the *Information Digest* and the two (2) articles involved in the case, one of March 30, 1984 and the other of March 8, 1985, it appears that the plaintiff already has substantial evidence to establish knowing falsity or reckless disregard of the truth, and pursuing these alternative sources would lead at this point in time only to cumulative evidence. Of course, the Magistrate does not intend to prejudge the merits of this case, but at argument on June 4, 1986 counsel for the plaintiff did acknowledge that he felt he had a *prima facie* case against the defendants. If the Magistrate is wrong in this assessment of the case, counsel can ask for a brief extension of the discovery completion date of June 6, 1986 by filing a motion to be acted on by the Court (Revercomb, J.) setting forth good cause for a brief extension of discovery and the names of those alternative source individuals they now wish to depose and a statement of the importance of their depositions at this stage of the case. In the absence of such a motion, discovery shall be deemed closed as of June 6, 1986 as to the liability issues in this case, and counsel shall proceed with the filing of dispositive motions, if any, and if such motions are denied, then they shall proceed with preparing this case for trial within the time frame previously established by the Court.

The foregoing analysis, reasons and application of judicial precedent are relied upon to support the oral ruling of the Magistrate from the bench on June 4, 1986 denying the motion to require the disclosure of the identity of the confidential source and upholding John Rees's claim of privilege. This Memorandum Opinion is in amplification of the reasons stated orally from the Bench at the time of the ruling.

Date: _____

_____

ARTHUR L. BURNETT, SR.
United States Magistrate

APPENDIX D

TRANSCRIPT OF PROCEEDINGS

United States District Court

FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.	:	
	:	
Plaintiff	:	
	:	Civil Action Number
v.	:	
	:	84-3452
JOHN REES, et. al.	:	
	:	
Defendants.	:	

DEPOSITION OF JOHN REES

Washington, D.C.

Friday, August 30, 1985

Q Now, where is that bank account maintained?

A The credit union on Capitol Hill.

Q Do you have the address of that credit union on Capitol Hill?

A No, I don't.

Q Do you know the name of the bank?

A I think it's—I really don't.

Q Can you provide that information for us on Tuesday?

A I expect so.

Q When did you open that bank account, Mr. Rees?

A I don't recall, Mr. Lane.

Q Approximately?

A Probably 1974.

Q Are you the sole signatory in that bank account?

A No, Mr. Lane.

Q Who else is a signatory to that bank account?

A My wife, Sheila Louise Rees.

Q Was she a signatory on that account when it was opened?

A Yes, she was.

Q Has she been a signatory on that account from that time until the present time?

A Yes, she has.

Q From the time the bank account was opened to the present time, has there been anybody else who at any time was a signatory to that account?

A Not to my knowledge, Mr. Lane.

Q Was it possible there was someone who was a signatory and you don't know about it?

A I can't speculate on it, no.

Q Do you get the statements from that account?

A Yes, Mr. Lane.

Q Have you ever noticed that checks have come back with somebody's name signed on it other than you or your wife from the time of the inception of that bank account to the present time?

A It is not a checking account, Mr. Lane.

Q How does it work? Explain that to us, Mr. Rees.

A You give the bank money, they keep the money. When you need the money, you go to them and you fill out a slip which you identify yourself by name, and they return the money to you.

Q And do you get monthly statements from the

objection.

BY MR. LANE:

Q Do you recall the question, Mr. Rees?

A Yes, Mr. Lane.

Q What is the answer?

A Among the people I spoke to before the article was completed were Mr. Irwin Suall of ADL; Ms. Pat Lynch of NBC; Mr. Scott Stanley of the review of the news.

Q Is there anyone with whom you discussed any aspect of the Information Digest of March 30, 1984, before it was published, whose name you do recall, other than the three names you have given?

A No, sir.

Q Who made the decision to publish the material which appears in the Digest of March 30 of last year?

A I did.

Q Did you discuss it with anyone before you published it? The decision to go ahead with that publication, that is.

A Yes, I did.

Q With whom did you discuss it?

A With Sheila Louise Rees.

Q With any other person?

A No, sir.

Q Do you make all of the editorial decisions for Information Digest?

A No.

Q Who participates in making those decisions?

A Sheila Louise Rees.

Q Does she make some decisions?

A Yes, she does.

Q Would you explain to us what the breakdown is, Mr. Rees, in terms of decision-making.

A There is no formal procedure, Mr. Lane.

Q Does Mrs. Rees on occasion make editorial decisions?

A Yes, she does.

Q I am going to show you page 2 of the Exhibit 2 to this deposition and ask you to read interrogatory 3: "How are editorial decisions made in Information Digest, who participates in decision and discussions, who has ultimate editorial responsibility?"

"Answer: Editorial decisions are made by John Rees."

Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 88-687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LIBERTY LOBBY, INC., Petitioner,

v.

JOHN REES, SHEILA LOUISE REES, and
THE INFORMATION DIGEST, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

In ruling on a motion for summary judgment in a public figure libel case, is the district court bound by a magistrate's comments on the issue of actual malice, when neither the issue nor the proper standard was before the magistrate?

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STATEMENT OF THE CASE

This is yet another action by an "outspoken, often vicious, critic of Jewish groups and leaders," which has frequently resorted to "the use of the libel complaint as a weapon to harass." Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1297 n. 7 and 1303 (D.C. Cir.), cert. denied, _____ U.S. _____, 109 S. Ct. 75 (1988). None of its prior actions has succeeded, and "in no instance has Liberty Lobby been allowed to present its claims to a jury." Id. at 1303 n. 9 (emphasis in original). This case was no exception. Having already failed to present a jury question in actions against the publisher of the Wall Street Journal and the National Review (among others), Liberty Lobby in this

case proceeded against a small-circulation newsletter with fewer than one hundred subscribers and its publishers. It enjoyed the usual result -- a summary judgment entered against it after two years of contentious and costly discovery.

Liberty Lobby's Petition for Certiorari is replete with inaccuracies and omissions, not the least of which involve the Magistrate's Memorandum Opinion. A substantial portion of that opinion has been deleted, without signal or explanation, from Appendix C to the Petition. The entire opinion is reported at 111 F.R.D. 19 (D.D.C. 1986).

The factual and procedural background of this case is accurately portrayed in the careful opinions of the Court of

Appeals (Petition, Appendix A) and the District Court (Petition, Appendix B), to which we respectfully refer the Court. After carefully reviewing the entire record, and considering each of the arguments that petitioner now serves up for the third time, the Court of Appeals concluded that "the absence of sufficient evidence of actual malice is strikingly apparent." Petition, Appendix A-13. The Court of Appeals therefore affirmed the District Court's order granting summary judgment on behalf of the respondents.

ARGUMENT

Like the District Court before it, the Court of Appeals carefully followed the teachings of Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Bose Corp. v. Consumers Union, 466 U.S. 485

(1984). Properly applying Anderson, the lower courts in this case did not, as petitioner baselessly asserts, weigh the evidence, evaluate the credibility of witnesses, or accept "all inferences in favor of the defendants." Petition at 8. Instead, as Bose requires, and as it had done six months before in Liberty Lobby v. Dow Jones Corp., 838 F.2d at 1293, the Court of Appeals made "an independent examination of the whole record" (Petition, Appendix A-7, quoting Bose and New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)). Once again the Court of Appeals found that summary judgment against petitioner was compelled, based on an "uncontested showing that the published articles were based on documented

evidence" in other reputable publications. Petition, Appendix A-9.[1] There is no more reason for this Court to review the appellate court's conclusion in this case than there was in the Dow Jones case.

The Court of Appeals correctly disposed of petitioner's principal claim before this Court: that a jury trial was mandated as a matter of law because a U.S. Magistrate, in the course of

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1 Petitioner misleadingly implies that one of these prior publications had been "retracted in full." Petition 8. As the Court of Appeals pointed out, the "retraction" was of a single sentence and did not affect the article's description of Liberty Lobby's ties with Lyndon LaRouche, the subject of the petitioner's libel claim in this case. Petition, Appendix A-13.

resolving a discovery dispute,[2] had expressed the view that there was "substantial evidence to establish knowing falsity or reckless disregard of the truth." Petition, Appendix A-28; 111 F.R.D. at 23. The Magistrate's remark was not intended to preclude the District Court from ruling on a summary judgment motion, nor could it have done so.

---

2 The discovery dispute concerned a motion to compel disclosure of a confidential source. The Magistrate denied the motion for many reasons, including that the statement attributed to the source "does not go to the heart of the case"; that disclosure "at most, would involve a collateral matter and result in cumulative evidence" and that counsel for petitioners had offered to stipulate that he would not rely on the source as evidence of truth or lack of malice. 111 F.R.D. at 21-22. Petitioner has deleted this portion of the Magistrate's opinion from its appendix.

First, the Magistrate immediately cautioned that his remark was not intended to "prejudge the merits of the case"; indeed he directed counsel "to proceed with the filing of [any] dispositive motions . . . ." Id. Second, the Magistrate was not authorized to "hear and determine" a summary judgment motion. 28 U.S.C. § 636(b)(1)(A). Third, the Magistrate did not review all of the evidence, ultimately presented to the District Court, showing the respondents' "reliance on previously published sources" (Petition, Appendix A-8), evidence that the District Court and the Court of Appeals found dispositive. Fourth, the Magistrate never purported to apply the constitutional standard, mandated by Anderson v. Liberty Lobby, in summary

judgment cases such as this: "clear and convincing evidence." Finally, no matter how the Magistrate might have viewed the evidence, those views, under Bose, could not affect the obligations of the District Court and the Court of Appeals independently to evaluate the evidence:

> Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

486 U.S. 485, 511 (1984).

Because the Court of Appeals and the District Court properly performed their constitutional function as judges under Bose and Anderson, petitioner has presented no question worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 27, 1989

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

—against—

JOHN REES,
SHEILA LOUISE REES,
and THE INFORMATION DIGEST,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Liberty Lobby, Inc. v. National Review, Inc., No. 79-3445 (D.C. Apr. 20, 1982) 2

No. 88-687

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

v.

JOHN REES, SHEILA LOUISE REES,
and THE INFORMATION DIGEST,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

In accordance with Rule 22.5 of the Supreme Court Rules, this reply brief will address itself to arguments raised in Respondents' Brief in Opposition and will be as short as possible.

I.

Respondents have wrenched out of context the decision of the Court in *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, (D.C. Cir.), *cert denied*, _____ U.S. _____ , 109 S.Ct. 75 (1988) and have falsely asserted that the Court had held that "[n]one of its [Liberty Lobby] actions has succeeded." (Respondent's Brief in Opposition, p. 1) The Court in *Dow Jones* had made reference to a discrete number of cases and concluded that "[n]one of these suits has been successful." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1297 (D.C.Cir.), *cert. denied*, _____ U.S._____ , 109 S.Ct. 75 (1988). In fact, the list of cases considered by the Court was limited to just four cases other than the matter now pending before this Court. One of those cases, *Liberty Lobby, Inc. v. Anderson*, 562 F.Supp. 201 (D.D.C. 1983), *aff'd in part, rev'd in part*, 106 S.Ct. 2505 (1986), is still pending before the United States District Court, having been remanded by the United States Court of Appeals for the District of Columbia. In another case, *Liberty Lobby, Inc. v. National Review, Inc.*, No. 79-3445 (D.C. Apr. 20, 1982), the jury rendered a verdict in which Liberty Lobby substantially prevailed. Indeed, in that case National Review appealed from the decision to the Court of Appeals for the District of Columbia after a jury verdict. The entire matter was later resolved between the parties through settlement.

In addition, there are numerous cases involving Liberty Lobby which Liberty Lobby has settled to its satisfaction or prevailed before a jury. Among those are the case brought by treasurer of Liberty Lobby, Willis A. Carto against Fawcett Publications, Inc. for having published a defamatory article in True magazine about Liberty Lobby during 1969, up to and including *E. Howard Hunt, Jr. v. Liberty Lobby, Inc.*, 824 F.2d 916 (11th Cir. 1987), won by Liberty Lobby as a result of a jury verdict rendered during 1985.

Given these circumstances, it is clear that the assertion by the Respondents that Liberty Lobby has never succeeded in a prior action, is, in addition to being irrelevant, and an attempt to prejudice the Court, without merit and made of the whole cloth.

Respondents also assert that Liberty Lobby's Petition for Writ of Certiorari "is replete with inaccuracies and omissions, not the least of which involve the Magistrate's Memorandum Opinion." (Respondents' Brief in Opposition, p. 2) However, Respondents are unable to point to any alleged inaccuracy or omission other than the fact that in keeping with the Rules of the Supreme Court urging Petitioners to be brief and economical, Petitioner published every relevant page of the Magistrate's decision, omitting only a discussion of issues which have no bearing upon the Petition. However, Respondents imply that the Magistrate, in his opinion

on this question, which they refer to as a "remark," commented upon the matter which is now before this Court on only one occasion in his opinion. (Respondents' Brief in Opposition, p. 6) Indeed, as Appendix C, submitted by the Petitioner demonstrates, the Magistrate did not remark upon the presence of actual malice on one occasion, but expounded upon that question on two occasions, (Petitioner's Appendix, pp. A-26 and A-28).

II.

Having responded to the inaccuracies in Respondents' Brief in Opposition, regarding non-central questions for the purpose of correcting the record, Petitioner now addresses the central question pending before this Court.

A United States Magistrate who reviewed the entire case and before whom all the crucial depositions were taken, concluded that the Plaintiff had established through the presentation of clear and convincing evidence actual malice by the Defendants. Although Petitioner in its Petition for Writ of Certiorari took great pains to point out that it did not contend that the U.S. Magistrate had been designated to hear and determine a motion for summary judgment, (Petition, pp. 12-13) the Respondents in their Brief in Opposition continue to assert, as they had in their Motion for Summary Affirmance and in their appeal to the United States Court of Appeals, that the Magistrate was not authorized to hear and determine a summary judgment motion. (Respondents' Brief in Opposition, p. 7)

Petitioner amply demonstrated in its Petition for Writ of Certiorari that Honorable Arthur L. Burnett, Sr., United States Magistrate, not only presided over every relevant deposition, but was called upon to review all of the relevant arguments and documents in the case over a period of more than a half of a year, and was intimately familiar with all of the evidence offered by the Defendants/Respondents and all of the evidence upon which the Defendants/Respondents relied. To this assertion Respondents simply reply that "the Magistrate did not review all of the evidence." (Respondents' Brief in Opposition, p.7) However, to support that conclusion, Respondents are unable to cite a single document or argument which the Magistrate had not reviewed before publishing his Memorandum Opinion. Petitioner observes that the reason that Respondents are willing to rest with their general assertion that the Magistrate did not review all of the evidence, is that they are unable to point to a single word of testimony, exhibit, or argument offered by Respondents/Defendants which had not previously been studied by the Magistrate in this case. —

III.

The Respondents offer a novel theory in their Brief in Opposition as to the standard utilized by the Magistrate in his Memorandum Opinion. They suggest that he did not apply the clear and convincing evidence standard mandated by this Court in *Anderson*. (Respondents' Brief in Opposition, pp. 7-8) Throughout the proceedings Magistrate Burnett, who has since been appointed by the President of the United States to the Superior Court for the District of Columbia, demonstrated a profound knowledge of the law of defamation and the ruling of this Court in *Anderson*. To suggest, in the light of that record, that the statements of the Magistrate were based upon an unconstitutional standard, is absurd. In fact, in his well thought out Memorandum Opinion, the Magistrate cited *Liberty Lobby, Inc. v. Anderson*, (Appendix, A-27). In the same opinion in which he cited *Anderson* the Magistrate concluded:

> Further, the Magistrate is of the view that the plaintiff has sufficient other evidence suggesting fabrication, or at least reckless disregard of the truth based both on alternative sources and plaintiff's counsel's eliciting responses from both John Rees and Sheila Louise Rees, which as a matter of circumstantial evidence, will support arguments of malice, i.e. knowing falsity or reckless disregard of the truth. Counsel for the plaintiff has astutely, during the depositions of the defendants, probed their editorial processes and their state of mind with reference to research, writing and publishing of the two articles at issue in this case, as he was entitled to do under *Herbert v. Lando*, 441 U.S. 153 (1979).
>
> (Appendix, A-26, Memorandum Opinion, June 10, 1986, p. 8)

In addition, the Magistrate, in returning to the subject matter in his Memorandum Opinion held:

> Based on the Magistrate's exposure to this case and hearing the depositions of both John Rees and Sheila Louise Rees, the two principals involved in the publication of the *Information Digest* and the two (2) articles involved in the case, one of March 30, 1984 and the other of March 8, 1985, it appears that the plaintiff already has substantial

> evidence to establish knowing falsity or reckless disregard of the truth, and pursuing these alternative sources would lead at this point in time only to cumulative evidence. Of course, the Magistrate does not intend to prejudge the merits of this case, but at argument on June 4, 1986 counsel for the plaintiff did acknowledge that he felt he had a *prima facie* case against the defendants. If the Magistrate is wrong in this assessment of the case, counsel can ask for a brief extension of the discovery completion date of June 6, 1986 by filing a motion to be acted upon by the Court (Revercomb, J) setting forth good cause for a brief extension of discovery and the names of those alternative source individuals they now wish to depose and a statement of the importance of their depositions at this stage of the case. In the absence of such a motion, discovery shall be deemed closed as of June 6, 1986 as to the liability issues in this case, and counsel shall proceed with the filing of dispositive motions, if any, and if such motions are denied, then they shall proceed with preparing this case for trial within the time frame previously established by the Court.
>
> (Appendix, A-28, Memorandum Opinion, June 10, 1986, p. 11)

The record reveals that the United States Magistrate was familiar with all of the issues raised in the case, all of the evidence offered by the Defendants, that he had presided over every deposition of substance in the case, and that the only new evidence submitted to the District Court which the Magistrate did not have access to, were documents submitted by the Plaintiff/Petitioner which, of course, strengthened Plaintiff's Opposition to Summary Judgment. The record reveals as well that the Magistrate was not only familiar with the decision of this Court in *Anderson*, but that he cited it and relied upon it in his Memorandum Opinion. After exposure to all of the evidence and all of the arguments, the Magistrate, who conducted the depositions and had ample opportunity over a period of days to listen to the testimony of both Defendants (an opportunity which was not available to the United States District Court or the United States Court of Appeals) decided that the Plaintiff had established actual malice to his satisfaction and that any effort to permit the plaintiff to adduce further evidence of actual malice by pursuing alternative sources "would lead at this point in time only to cumulative evidence." (Petitioner's Appendix, A-28) Clearly, the Magistrate was familiar with the law and understood the standard set

forth by this Court in *Anderson* regarding the need to offer clear and convincing evidence. The suggestion to the contrary is unfair and is based upon nothing more substantial than the hopes of the Respondents.

If an impartial jurist, who was intimately familiar with the entire factual basis of the case, and all of the legal arguments offered by the parties, concluded that actual malice had been demonstrated to his satisfaction, how is it possible for a court to conclude that a reasonable juror could not have reached to same conclusion? The gift of prophecy was not required of the District Court in this one particular case.

CONCLUSION

Petitioner respectfully suggests that for the foregoing reasons the Petition for Writ of Certiorari should be granted.

February 10, 1989

Respectfully submitted,

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